IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION, a corporation, Appellee,
vs
THE UNITED STATES OF AMERICA, Appellant

No. 6867

THE J. K. MULLEN INVESTMENT COMPANY, a corporation, Appellee,
vs
THE UNITED STATES OF AMERICA, Appellant

No. 6868

APPELLEE'S BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO, EASTERN DIVISION.

HON. CHARLES C. CAVANAH, District Judge

BISSELL & BIRD,
Of Gooding, Idaho,
For Appellee.

Filed Dec. ....., 1932,

....., Clerk.

SUBJECT INDEX

TABLE OF CASES

TEXTS AND STATUTES

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION, a corporation, Appellee,
vs
THE UNITED STATES OF AMERICA, Appellant

No. 6867

THE J. K. MULLEN INVESTMENT COMPANY, a corporation, Appellee,
vs
THE UNITED STATES OF AMERICA, Appellant

No. 6868

APPELLEE'S BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO, EASTERN DIVISION.

HON. CHARLES C. CAVANAH, District Judge

BISSELL & BIRD,
Of Gooding, Idaho,
For Appellee.

Filed Dec. ....., 1932,

....., Clerk.

All figures in parentheses refer to page numbers of the transcript in case bearing District Court No. 731, No. 6867 in this court, unless otherwise stated. All heavy type is that of the writers'.

EXCEPTIONS TO APPELLANT'S STATEMENT OF FACTS

Appellee considers that the appellant's statement of facts is somewhat incomplete in certain particulars, and slightly inaccurate in other particulars. On page 9 the statement is made that the assessments were paid in full on the lots acquired by the United States. This statement is probably not legally correct, because as a matter of law the re-assessments are part of the assessments, and it cannot be accurately stated that any particular lot has paid its assessment in full until the entire obligation has been discharged. As will be later pointed out, the government officials knew, and it was a matter of common knowledge in American Falls, that these assessments were not paid in full at the time the government acquired these lots and at the time the property owners gave over possession of the reservoir site to the United States. The government officials withheld a portion of an agreed purchase price until some time in 1929, and then released these sums to the individual property owners. The evidence upon this phase of the case is shown in some detail beginning on page 22 of this brief.

At the bottom of page 9 of appellant's brief the statement is made that the government purchased these lots from the property owners from 1920 until 1926. The inference is made here and at numerous points in the brief that when the government purchased a particular lot it then and there became the absolute owner of such lot. The fact is that at the time of purchasing these individuals plots the government and the individual owners signed land purchase contracts, a sample of which appears as defendant's exhibit 1 (144). Paragraph 3 of this purchase contract obligates the vendor to convey the property to the United States by good and sufficient deed. As is pointed out on page 3 of Judge Cavanah's memorandum opinion these deeds contained the following provision.:

> "Vendor retains possession of all the buildings and improvements on the above described land, and agrees to remove the same to land outside of the American Falls Reservoir site by January 1, 1927."

In other words, when these individual purchases were made by the government the owners were not disturbed in their possession and enjoyment of the property immediately, but they were permitted to continue such possession and use until the dam was sufficiently completed to permit water to be impounded in the reservoir. As the trial court found, these individual owners re-

mained in possession until about the 1st of January, 1927, about which time the reservoir was filled (76).

On page 10 of appellant's brief reference is had to certain condemnation suits. Appellant neglects to state that neither the appellee nor its predecessor in interest was a party to these suits (76).

On page 10 of appellant's brief the statement is made that the payments made by the goverment benefited rather than injured appellee. Page 113 of the record is cited to support this statement. We find nothing on the latter page to this effect. No doubt the payments made by the government benefited appellee and other property owners in the district. It is not the payments actually made that appellee is complaining of. The appellee is complaining because the government appropriated appellee's property and destroyed its security before completing the payments.

On page 11 of its brief appellant states that the work of tearing down and moving the buildings from the reservoir site commenced in 1920 or 1921, and continued through the year 1925. No reference is given for this statement. We do not believe that the record bears out this statement. Upon this point the record merely shows that the Grand Hotel, the last building to be moved from the reservoir site, was moved either in the winter of 1925 or in the spring of 1926 (123). The record does

not show when the first buildings were moved or when any other than this one building was moved. The same error will be found in the "chronology" on p. 15 of appellant's brief.

Appellee also takes exception to appellant's statement of the theory upon which the trial court's findings and judgment are based, as contained on page 13 of appellant's brief. In a few words the theory upon which the cases were submitted and determined by the trial court is that the government has appropriated private property for a public use without making just compensation to the owners, and thereby the government has become liable to the owner upon an implied contract. This theory is borne out by the findings and conclusions, and also by the court's memorandum opinion. The latter opinion was not incorporated into the printed record. After the printed record was filed, counsel for appellant advised appellee that such memorandum opinion was being supplied to this court by a supplemental record, and the writers assume that the same is now available to this court.

Appellee considers that a more concise and more pertinent statement of the facts is necessary.

APPELLEE'S STATEMENT OF FACTS

In 1915 and 1916 certain local improvement districts were organized in the city of American Falls under the provisions of the Idaho Compiled Statutes, sections 3999

et seq. Under these statutes an improvement district may be organized from a part of a municipality. After certain preliminary steps the ordinance creating the district is enacted. This ordinance describes all the property in the district and provides that the improvements shall be made and the cost and expense thereof taxed and assessed upon all property in the district in proportion to the number of feet of each particular lot fronting on the street so being improved or contiguous thereto C. S. section 4007 provides that the expense and cost of the work shall be assessed against the lands and shall "become a lien upon said lands, which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure." Provision is made for exceptions by any property owner or tax payer. These assessments are known as special assessments and are to be levied and collected as a separate tax in addition to the taxes for general revenue purposes. C. S. section 4013.

Under the provisions of C. S. section 4014 the city officials are authorized to provide for the payment of these assessments on the installment plan, extending the payment over a period not exceeding ten years. To do this bonds are issued, and the latter section provides the method of their issuance, the rate of interest, etc. Section 4018 specifies the form of the bond to be used. See-

tion 4024 provides for reassessment in case the original assessment is insufficient for any reason. Since the reassessments, later to be mentioned, are attacked, a paragraph of this section is quoted, to-wit:

> "Whenever, **for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement** made and enjoyed by owners of property in the local assessment district where the same is made, **it shall be lawful,** and the city council or trustees or other authorized board or body is hereby directed and authorized **to make reassessments on all the property in said local assessment district sufficient to pay for such improvement,** such reassessment to be made and collected in accordance with the provisions of the law or ordinance existing at the time of its levy."

Section 4026 requires the owner of any such bonds to look exclusively to the enforcement of such asessments for the collecttion of the amounts due him; the municipality being responsible only for the collection of the assessments.

It was under these statutory provisions that the local improvement districts in question were organized in 1915 and 1916, and in due course the bonds now before the court issued. The bonds were originally sold to Mr. J. K. Mullen, who in turn transferred the same to the plaintiffs. The bonds are payable to bearer. The improvement districts in question are all situated within the territory formerly occupied by the city of American Falls.

The building of the American Falls reservoir by the appellant necessitated the moving of the major portion of the city of American Falls, including all of the territory covered by the improvement districts in question, except a portion of district No. 9. The reservoir was built by the United States as a Reclamation Act storage reservoir, under authority of the act of June 17, 1902 (43 U. S. C. A. secs. 411, et seq.), but "without any proceedings in eminent domain against the plaintiff or its predecessor in interest J. K. Mullen, the defendant being aware and advised that the bonds held by this plaintiff (appellee) and the interest thereon were outstanding, due, and unpaid, * *"(71-2).

The government acquired most of the property for this reservoir site by direct purchase from the individual owners. The form of contract of purchase is shown by defendant's exhibit No. 1 (144). These contracts were made on different dates between 1920 and 1926. This particular contract was made December 9, 1925. Soon after the execution of the contract the individuals gave the government warranty deeds, which deeds and contracts, as pointed out in Judge Cavanah's memorandum opinion, permitted the sellers to remain in possession till January 1, 1927, or such earlier time as the premises might be needed for reservoir purposes. The contracts and deeds permitted the individual owner to remove

buildings from the site of the reservoir on to higher ground, the new townsite being nearby. The last building moved from the reservoir site was the Grand Hotel, which was late in the winter of 1925 or early in the spring of 1926 (123). The reservoir started filling in '26 and the entire reservoir site was flooded "on or shortly after January 1, 1927" (76).

The contracts of purchase between the government and the individual owners provided that any liens or incumbrances existing against the property might "be removed at the time of conveyance by reserving from the purchase price the amount necessary, and discharging the same with the money so reserved". See paragraph 7, defendant's exhibit 1. Consonant with this authority the government held out $13,000 or $14,000 for the purpose of meeting the balance due on the bonds involved in the present litigation (134-5). However, the government some time in 1929, apparently shortly before the institution of the present suits, determined that this money should be paid to the owners, and this was done. At the time this money was paid to the owners the government officials knew of the claims of the appellee in these two suits, and in fact it was a matter of common knowledge in the city (136 & 122-3).

While the act of making the reassessments does not seem to be very material in the present controversy, be-

cause the appellant had actual knowledge of the unpaid accounts, it definitely appears from the records that these reassessments were made by ordinances Nos. 122 to 125, inclusive, of the city of American Falls in the summer of 1928 (exhibit 16). These ordinances were not attacked in any direct manner and the same stand as the valid enactments of the city. These reassessments were made necessary by the insufficiency of the original levies. The causes of such insufficiencies are pointed out in detail by witness Bowen (111-118). In brief they are: (1) Lack of conformity between the denominations of the bonds and the collections realized from the assessments from time to time, resulting in moneys remaining idle frequently; (2) Maturity dates of bonds did not coincide with payment dates of taxes and assessments, resulting in moneys not being used promptly; (3) In making the original assessments and levies no allowance was made for the 1½% collection fee (117), which C. S. sec. 3224 allows the county for collecting levies of such improvement districts (Bosworth v Anderson, 280 Pac. 227, 229); (4) The set-up on the assessment rolls for interest did not provide for interest on the bonds the first year, resulting in the use of money received for principal payments to meet interest requirements (117-8); (5) Insufficient interest charge on delinquent taxes as compared with interest on bonds (118); and (6) Non-payment of taxes by some of

the owners in the improvement districts. Due to these and many other factors all the bonds were not paid.

The one and only means of enforcing the assessment upon which appellee's bonds are based and the one and only method of collecting the amounts represented by the bonds in controversy was by the enforcement of the lien against the lands in these respective improvement districts. This is the provision of the statute, the holding of the Idaho courts and of the trial court in the immediate cause. Therefore, when on or about January 1, 1927, the United States took absolute and complete possession and control of this real property, the appellee's bonds and statutory liens were effectively and completely destroyed. This constituted the taking of private property for public use without compensation, and upon this theory the pleadings were drawn and the action instituted. Upon this theory the demurrer to the complaint was overruled, Judge Cavanah's opinion on the demurrer being reported in 40 Fed. (2) 937. In brief, Judge Cavanah held that the United States had appropriated to a public use private property, and the government thereby became liable upon an implied contract for the value of the property taken. The findings of fact and conclusions of law are in line with this theory, and the judgment is in favor of the appellee for the value of its bonds, less certain amounts. The major amounts for

which appellees were not given judgment as prayed were due to two factors: (1) The reservoir did not cover all of one of the districts, and a pro rata amount was deducted for the lands not taken; and (2) some moneys were collected from the owners, deposited in local banks, which banks closed before the money was paid over to the appellees or the then owner of the bonds. The latter amounts were deducted by the trial court, and the amount of the Forter judgment was also deducted. So that while the complaint in the immediate case asked for judgment of approximately $10,000.00 the amount of the judgment actually given is only $8,104.79 (78); and while in case No. 743—6868 judgment was asked in an amount in excess of $1500.00, the judgment actually given only amounted to $388.48 (63).

The two cases were consolidated for trial, the bills of exceptions are identical except for amounts, names and such factors, and the same have, by stipulation filed in this cause, been consolidated for argument in this court. The applicable law is the same in either case.

BRIEF OF THE ARGUMENT
U. S. STATUTE OF LIMITATIONS

On pages 20-2 of its brief the appellant cites several cases holding that the failure to bring an action within 6 years bars recovery. Unquestionably 28 U. S. C. A. sec. 41, subd. 20, fixes the limitation at 6 years. The only im-

portant problem is to determine when the statute began to run.

On page 22 of its brief the appellant takes the position that in this particular case the statute began to run "at the time the United States acquired the lands in question by purchase or condemnation." Appellee does not agree with this statement, but will discuss the appellant's position. Appellant cites no authority upon this particular phase of the case, that is, no authority showing that the mere signing of a contract to convey, and even an actual conveyance, permitting the vendor to continue the possession and enjoyment of the property, amounts to the taking of property so as to start the statute of limitations in an action for the taking of such property. Appellee does not feel that any such authority can be cited. There can be no liability on the part of the government in this case until the property is actually taken. A threat to take the property or a plan partly consummated cannot amount to a taking of the property. This is particularly true in this controversy, because so long as the land owners remain in the possession and enjoyment of their property, and so long as the property has not been flooded by the reservoir, appellee's lien upon the property remained physically intact and enforceable. It is only after the vendors have been compelled to vacate the property by the rising crest of the reservoir and the improve-

ments have been removed therefrom that appellee's lien and property right has been confiscated and destroyed. When that act occurs, then and only then does the appellee's right accrue. The trial court held that this happened about January 1, 1927 (76). This action was filed on November 25, 1929 (7), and the action in 6868 was filed July 24, 1930 (page 7 record in latter case). Both suits were therefore instituted within the statutory period of six years, as fixed by the Tucker act (28 U. S. C. A. sec. 41, subd. 20).

If it be conceded that appellant's theory upon this point is correct, appellee nevertheless insists that the bar of the statute cannot be upheld. On page 22 of its brief appellant states that the lots were purchased as early as 1920, "and a large part of the lots (were acquired) by purchase and condemnation between 1920 and 1923." By referring to the pages of the record cited by appellant we are unable to find that this quoted statement is borne out by the record. What the government engineer testified to was that he took possession of the first piece of land in 1920 or 1921 and the balance of the lots was acquired "between that time and the year 1926 when the dam was completed and some water stored behind the same." (131). This is far from a statement that the large part of the lots was acquired between 1920 and 1923. The fact of the matter is, as stated on page 22 of appel-

lant's brief, the record absolutely and completely fails to show just when any particular lot was acquired by the government, (except one lot which defendant's ex. 1 shows was bought in Dec., 1925) and therefore, under appellant's theory as to when the statute of limitations begins to run, there is no definite evidence in the record to fix the beginning of the statute as to any part of the land included within the improvement district and so confiscated by the government.

Appellant passes lightly over this phase of the case by intimating that this is a jurisdictional question and the duty rested upon the appellee to prove by competent evidence that its action is not barred by the statute of limitations. Unfortunately for appellant's position such is not the law. The law has become well recognized in a majority of the jurisdictions that the statute of limitations, being an affirmative defense, must be alleged and proved by the party relying thereon. In Idaho the majority rule prevails. In the recent case of Johnston vs. Keefer, 280 Pac. 324, 326, the Idaho court held:

> "The statute of limitations is an affirmative defense which imposes the burden upon the one asserting it to prove every element necessary to establish it (citing cases)."

As shown in 37 C. J. 1243, note 59, and 17 R. C. L. 1004 this is the majority rule. This is the rule in the State of California, First National Bank vs. Armstrong, 294 Pac.

25. This is also the rule in the State of Oklahoma, Warner vs. Wickizer, 294 Pac. 130. We quote the following paragraph from the latter opinion:

> "Where the statute of limitations is pleaded as an affirmative defense, the burden of proving it is on the one who asserts it, and where the evidence is conflicting as to whether or not the statute of limitations has run, the finding and verdict of the jury thereon will not be disturbed on appeal, if there is any evidence reasonably tending to support such verdict and finding (citing cases)."

The latter quotation is particularly pertinent to the immediate cause in view of conclusion of law No. 3 (77), wherein the trial court found, upon conflicting evidence, that the statute of limitations is not available as a defense in this case.

In the recent case of Jackson vs. United States, 24 Fed. (2d) 981, 986, it was held that this rule is enforceable as against the United States government. The latter case was reversed as to the interest feature only by the Circuit Court of Appeals (34 Fed. (2d) 241), and as so modified it was approved by the U. S. Supreme Court, 281 U. S. 344, 50 S. C. R. 294.

This rule has been adopted in the federal court for the district of California, in the case of Borland vs. Haven, 37 Fed. 394. We quote the following pertinent excerpt from page 413 of that opinion:

> "Besides the defense is an affirmative one, set up by the defendants, themselves, and it devolves

> upon them to show, affirmatively, that the bar has attached, and to what part. **Now, it does not appear how much was paid more than three years before the bringing of the suit, and the court has no evidence upon which to apply the statutory bar, if any there be, to any particular part of the sum paid.** The defense therefore, on both grounds must be overruled."

The appeal taken to the U. S. Supreme Court in the latter case was dismissed, 159 U. S. 255, 40 L. Ed. 140. This case is particularly interesting because of the underscored portions of the quotation, when it is borne in mind that the evidence does not show just when any particular lot within the confiscated area was purchased by the government. Therefore, if appellant's theory as to the statute of limitations be adopted as the law generally, it could not be enforced in this cause, since the evidence admittedly fails to reveal the date of the acquisition of any particular lot or parcel by the government. The defense of the statute of limitations is an affirmative one and the party relying thereon must submit proof to support his position. Appellant has not met this responsibility and its position upon this phase cannnot be sustained, even upon its own theory of the law.

APPELLEE'S POSITION RE LIMITATIONS

Appellee urges that the trial court's conclusion that the statute of limitations began to run on the date of the flooding of the property—about January 1, 1927, (76) is correct. In considering this question it must be re-

membered that appellee was not a party to any of the condemnation suits, neither did it join in the execution of the deeds from the individual landowner to the government. In no way did appellee part with any of its property rights. How can it be legally concluded that these deeds from individuals to the government affected appellee's rights in any manner? Appellee was not a party to these transactions, and it is not shown that it had actual knowledge thereof, and the record does not reveal when any of these contracts or deeds were placed of record so as to give appellee constructive notice, with one exception. The defendant's exhibit 1 does show that the contract of sale between the government and C. F. Dahlen was placed of record January 14, 1926. The present action was filed within 6 years of such date. So far as appellee's lien and property right are concerned these conveyances from the individual owners to the government had no influence whatever. Such conveyances, in contemplation of law, had no more bearing upon appellee's property than any of the conveyances of the property within these districts from one individual to another might have had. We assume that it is a matter of common knowledge that property within these various districts is conveyed from one individual to another from time to time during the life of bonds like those now before the court. Such conveyances do not affect the priority or

validity of the lien of the bond and district assessments. By the same reasoning it must be concluded that the conveyances from these individuals to the government did not affect appellee's property, and consequently did not start the statute of limitations running, so far as the present suit is concerned. It is significant that the present action does not seek redress for property of the individual property owners taken by the government, but only for property of the owners of the bonds-liens. The latter property rights were not molested until the actual appropriation and confiscation of the lands and the destruction of appellee's liens thereon, which happened about January 1st, 1927.

The occurrence which started the applicable statute of limitations running was the actual taking and appropriation of appellee's property by the government. This happened when the lands were actually possessed and flooded for reservoir purposes. With the happening of that event these lands, upon which appellee had a lien to secure the payment of its bonds, were confiscated and henceforth devoted exclusively to governmental purposes, actually destroying every claim which the appellee had thereon. In the case of Seven Lakes Reservoir Co. v Majors, 196 Pac. 334, the Colorado court considered a question almost identical with that now in hand. In the reported case a certain irrigation project built dams at

the outlets of several lakes and as a part of the system used a small creek to transport the stored water; this unnaturally large use of the stream bed caused large gulleys to be cut and considerable of the plaintiff's land to be washed away and damaged. The Supreme Court of Colorado points out that the action is either upon an implied promise to pay or upon a liability under the constitution, providing that private property cannot be taken or damaged without compensation. Several federal cases are cited. The crucial question was when the statute of limitations began to run. In concluding an extensive discussion of the problem the court held that the right of action accrued and the statute began to run at the first visible and sensible appearance of injury from the erosion and washing away of the banks, and damage to adjacent land by the running of the unusual volume of water along the channel. Several analogous cases are cited in the opinion, and appellee feels that these cases satisfactorily determine the question under consideration.

In the absence of condemnation, or some statutory procedure, for determining the value of property to be taken for a public purpose, an owner is not entitled to be paid in advance of the actual taking of his property, for he does not know until such occurrence that his property will actually be taken, or how much will be taken. The immediate action is under the Fifth Amendment, and "The Fifth Amendment does not entitle him to be paid

in advance of the taking. Crozier v Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 306, 32 S. Ct. 488, 56 L. Ed. 771." Hurley v Kincaid, 285 U. S. 95, 52 S. Ct. 267 The Crozier case thus elaborates the rule:

> "Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking,—that is, that the amount should be ascertained and paid in advance of the appropriation,—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation; second, that, again, always having reference to the nature and character of the property taken, its value and the surrounding circumstances, the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of the government of the duty to make prompt payment of the ascertained compensation,—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end." (p 306 of U. S. report).

In considering the statute of limitations in the immediate cause appellee suggests that the following facts should be remembered. Defendant's exhibit 1, one of the standard forms of land purchase contracts used by the government (124) in acquiring this land, contains a provision (paragraph 7) authorizing the government to reserve from the purchase price to be paid for any particular tract of land such amount as may be necessary to discharge any liens or encumbrances existing against the

property at the time of the conveyance. The record conclusively shows that the United States officials chose to take advantage of this provision and reserve funds from such purchase prices to take up the amount due the appellee on the bonds under consideration and the assessments levied in connection therewith. As Mr. Bohlson, one of the clerks in charge, testified:

> "* * *We held out an amount from each property owner that was estimated to be sufficient to retire any assessments against the property that might be levied in the future, on account of existing bonds." (136)

This witness also testified that all of the members of the reclamation force knew of these outstanding bonds (136). Mr. Banks, the chief engineer, testified that he had knowledge of these unpaid improvement bonds, and he stated:

> "* * *I think that the government retained the sum of from $13,000 to $14,000 **until sometime in 1929** before they paid it to the landowners; it was withheld for the purpose of paying any **reassessments that might be held valid liens.**" (134).

Witness Davie stated that when the government purchased his property it temporarily withheld money for such purposes for two or three years (121). Witness Sparks, the mayor of American Falls, testified in part as follows:

> "When settlement was made for my property, there was an amount held up to cover contingencies arising in case there was not enough money from these sidewalk and sewer assessments to retire the bonds; **this was in addition to the amount held back for the payment of current taxes. a mort-**

> gage and the payment of the balance of the ten annual assessments on my sewer and sidewalk * * *
>
> "* * * it was commonly known around town that a portion of the money due each property holder in the district was withheld by the government for that purpose." (122-3).
>
> " * * * Some deductions were made in purchases about the year 1923; * * *" (124).

There is considerable other testimony along these lines. Unquestionably the court's twenty-fourth finding (75) is amply supported by the evidence. Such finding is to the effect that at the time of the taking of the property by the government the government officials in charge knew that the assessments levied to pay the bonds held by appellee were insufficient to pay and discharge the unpaid amounts thereof and that the holders of the bonds would be deprived of the amount due thereon unless the government paid it; and that at the time of the taking of this property by the United States it withheld from the record owners of the property amounts sufficient to fully pay and discharge appellee's claim, in addition to amounts withheld to pay general taxes, mortgages, etc.

So long as the government was thus recognizing appellee's claim, and so long as the government was thus taking precautions to guarantee that appellee's bonds would be paid, the appellee would not have been justified, morally at least, in instituting a suit against the government. But as soon as the appellee learned that these moneys were being paid to the record owners, which was

some time in 1929 (134), certainly appellee was justified in concluding that its bonds would not be paid, since the government was no longer recognizing their validity. Since these land purchase contracts authorized the government to withhold money to take up appellee's bonds and the reassessments levied to pay the same by holding this money in an amount sufficient to take up the unpaid balance on the bonds, the government in fact impliedly promised to pay such moneys to those entitled thereto on demand. When the government paid these withheld moneys to the record owners, and not to appellee, the government thereby repudiated this implied promise and made it necessary for suit to be instituted. In this connection it should be remembered that the reassessment ordinances were enacted July 3, 1928 (plaintiff's exhibit 16), which was several months prior to the time this withheld money was turned over to the record owners by the government.

Concluding this branch of the case, appellee urges that under the applicable law the government became liable to the appellee for the taking of its property when the reservoir site was flooded and the lands upon which appellee held a lien became submerged and confiscated. However, since at this time the government was withholding money to pay appellee, thus fully recognizing appellee's claims and rights, and serving in the capacity as a trus-

tee to insure the payment of appellee's claims, it probably would not have been proper for the appellee to have instituted suit at that time. However, immediately upon the government's repudiating this trust and paying the money to the record owners suit was justified, in law and in equity. It is not necessary to determine, for the purpose of the immediate controversy, whether appellee's cause of action accrued when the reservoir was flooded, or when the government repudiated its trust and paid the money to the record owners, because the suits were instituted in 1929 and 1930, both of which dates are clearly within the six year statute period from the date of the flooding or the date of the repudiation of the trust.

This phase of the controversy is somewhat similar to the situation involved in the case of United States v Wardwell, 172 U. S. 48, 43 L. Ed. 360. In that case the statutes required the government officials to hold certain money in the treasury for the benefit of those whose currency might be destroyed by Indians, etc. The money was to be paid upon proper demands being made therefor. The demand was not made for a number of years, and when suit was brought, the statute of limitations was plead. The court held that the liability of the government continued until there was a direct repudiation of the liability on the part of the government, and that the statute of limitations did not begin to run until such re-

pudiation. So in the present case as long as the government was withholding the money to pay the appellee for its bonds, it is likely that suit could not have been properly instituted.

The case of United States vs. Taylor, 104 U. S. 216, 26 L. Ed. 721, is also somewhat similar. There the statute required the government, when selling property to satisfy tax claims of the government, to pay to the owner of the property any surplus that might remain after the taxes, interest, and costs should be satisfied. A certain piece of property was sold in 1865 for considerably more than the amounts due the government; in 1874 demand was made for this surplus. The demand was rejected and suit was filed about a year later, or more than ten years after the date of the sale. The court held that the six year statute of limitations did not begin to run until the demand was made and refused, since the government held the money in the capacity of a trustee. The same holding was approved in the case of United States v Cooper, 120 U. S. 124, 30 L. Ed. 606.

STATE STATUTES OF LIMITATIONS

On pages 48-51 of appellant's brief six sections of the state statutes, prescribing limitations for various forms of actions, are cited, and the argument is made that these state statutes apply to and bar the present action.

The present action is brought under 28 U. S. C. A. sec.

41, subd. 20, which is a part of the Tucker act. This section authorizes suits against the United States upon express or implied contracts, etc. The section contains the following sentence:

> "No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought **within six years** after the right accrued for which the claim is made."

Thus the Tucker act itself authorizes the action and fixes the period of limitations, and the situation is brought directly under the provisions of the exception in 28 U. S. C. A., section 725, which provides as follows:

> "The laws of the several States, **except where the Constitution, treaties, or statutes of the United States otherwise require or provide,** shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Among the annotations contained in USCA, following the last quoted section, will be found a number of cases on pages 237 and 238 showing that where a federal statute fixes the period of limitations state statutes of limitations are not applicable. An extensive discussion of this proposition would not seem to be necessary because the decisions are unanimous. All these cases hold that where a statute of the United States affords a remedy and imposes a limitation on actions thereunder, the statute of limitations of the states have no application. A charac-

teristic disposition of this question may be found in the case of United States v Boomer, 183 Fed. 726. We quote from page 730 of the opinion in that case:

> "The fixing of a period of one year in chapter 778, 33 Stat. 811, within which the action created by that statute should be commenced, was an exercise of the soverign power of the United States, and may not be repealed or modified by state legislation. It is true that the courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states and give them the same construction and effect which are given by the local tribunals. But in the case at bar Congress chose to enact its own statute of limitation, and hence section 721, Rev. St. U. S. does not apply."

The case at bar comes within the exception noted in 28 U. S. C. A. sec. 725, in that the federal statute creating the right to sue likewise fixes the period of limitation. Therefore, the state statutes of limitations have no bearing.

NATURE OF APPELLEE'S PROPERTY

Before considering the phase of the case dealing with the basic applicable principles of law perhaps it would be well to point out to the court the exact nature of the property invovled. It is true that the property referred to is in the form of bonds. However, these bonds are quite different from the average negotiable bonds which one naturally thinks of when the expression "bonds" is used. As pointed out in the statement of facts these bonds were issued under the local improvement district statutes

of the State of Idaho. There is no personal liability upon these bonds on the part of the improvement districts, or the cities within which such districts are located or the general taxpayers. In fact there is no personal liability at all, except, of course, in cases of misconduct in office, etc. In the recent case of Cowart v Union Paving Co., 14 Pac. (2d) 764, 767, the Supreme Court of California thus tersely summarizes the situation:

> "There is a **moral obligation** resting upon the property owners benefited by the improvement and an equitable right against the property itself, which the Legislature has power to legalize and enforce. (citing cases)."

In the case of New First National Bank v City of Weiser, 166 Pac. 213, the Idaho Supreme Court discusses the general statutes governing these bonds and the general force and effect of the bonds. This case is cited in Judge Cavanah's memorandum opinion. For the purposes now under consideration the following paragraph contains the important conclusions of that case:

> "The remedy of the bondholder in case a property owner fails to make payment of the taxes assessed against his property is not against the city nor the improvement district, nor against the person who has paid the sum due from him but against the property of the delinquent."

This decision is in accord with the provisions of C. S. section 4026, which provides as follows:

> "The holder of any bond issued under the authority of this article shall have no claim therefor

> against the municipality by which the same is issued, in any event, except for the collection of the special assessment made for the improvement for which said bond was issued, but **his remedy, in case of non-payment, shall be confined to the enforcement of such assessments.** A copy of this section shall be plainly written, printed or engraved on the face of each bond so issued."

As shown at page 19 of the record this provision was appropriately inserted in the bonds involved in this litigation. To the same effect see the Supreme Court's opinion in the case of Moore v City of Nampa, 276 U. S. 536, which involved analogous improvement districts, and wherein the U. S. Supreme Court held:

> "It is clear that respondent's (the city) faith or credit is not pledged and that the value of the bond depends upon the validity and worth of the assessments."

The Supreme Court of Idaho "has specifically and repeatedly held that where a special assessment district is created and bonds issued, the same are not general obligations of the municipality." Hughes v Village of Wendell, 275 Pac. 1116.

In the case of Bosworth v Anderson, 280 Pac. 227, the Idaho Supreme Court was again considering similar bonds. The court held that,

> "the lien of the bonds upon the lands of the improvement district become fixed and paramount to any other lien except those of the general state, county, and city taxes." (230).

As provided by C. S. section 4007 this lien may be fore-

closed in accordance with the provisions of the code of civil procedure.

It should be remembered that these bonds are but the evidence of the obligation created by the assessments; the only lien is that created by the assessments, and bonds are only issued to permit payments to be made in installments over a period of years. Balaam v Pacific States Sav. & Loan Co., 15 Pac. (2d-Cal) 186.

Thus it appears from these statutory provisions and court decisions that the bonds in question are liens upon the land in the respective districts, and nothing more (25 R. C. L. 174). These bonds represent an interest in the land, and when the United States confiscated and appropriated the land in these improvement districts it likewise confiscated and appropriated appellee's bonds and every element of its property represented thereby, because independent of the land the bonds are emphatically worthless. In contemplation of law the rights of the owners of these bonds are on a parity with the owners of any real estate mortgages in the same territory, and certainly when the government's land purchase contracts (see paragraph 7 defendant's exhibit 1) authorized the government to withhold enough funds from the purchase price of the lots in the district to remove liens or encumbrances existing against the property, such contracts empowered the government officials to withhold funds to pay these bonds

and the reassessments based thereon. In fact the government officials, until sometime in 1929, withheld moneys for said purposes.

LIEN IS PROPERTY RIGHT

Having shown that these bonds were nothing more than mortgages upon the land in the district and that the reassessments were justified in fact and valid in law, the next inquiry which naturally arises is, whether or not such a lien or encumbrance upon the land is such a property right as will be recognized in applying the fifth amendment to the United States constitution, which provides that private property cannot be taken for a public purpose without just compensation.

This question is answered in the affirmative by the decision of the case of Morgan v Willman, 58 A. L. R. 1518, and the annotation beginning on page 1534. In brief this opinion and annotation show that the courts universally hold that the interest of a mortgagee or encumbrancer in property taken under the power of eminent domain is property within the meaning of constitutional and statutory provisions prohibiting the taking of private property for public use without compensation. The annotation refers to one case in the U. S. Supreme Court (see page 1535). See also, the case of Ill. Trust & Sav. Bank v City of Des Moines, 224 Fed. 620, where it is said that "It is fundamental that a mortgage or trust deed, securing an indebt-

edness, is "property" within the meaning of the Constitution of the United States and the Constitution of the state of Iowa." An extended discussion of these authorities does not seem necessary, but reference may be had to 19 R. C. L. 343.

On page 1539 of the annotation in 58 A. L. R. the statement is also made that where only a part of the mortgaged property is taken, the mortgagee is entitled to pro rata compensation. The court's attention is directed to this to support the trial court's conclusion and judgment as to appellee's rights in the district No. 9, where only part of the district was taken for government purposes.

VALIDITY, NATURE, AND EFFECT OF THE REASSESSMENTS

In a general way this subject is discussed on pages 29 to 35 of appellant's brief. On page 29 appellant likens the claim of appellee to that of the holder of a general bond or warrant of a municipality. The very obvious distinction is to be found in the fact that a holder of a warrant or general bond of a municipality relies exclusively upon the financial responsibility of the municipality issuing such bond or warrant. In such case the municipality is personally liable and no lien exists against any particular parcel of land. As pointed out on pp. 28 to 31 hereof, just the reverse is true of the bonds involved in this litigation.

The statement on page 30 of appellant's brief that the action of the government has been beneficial to appellee in that delinquent taxes have been paid up is pure speculation. No one can say that these would not have been paid up if the reservoir had not been constructed. On the other hand, it might just as logically be suggested that the possibility of the building of the reservoir, hanging over the citizens for a number of years, materially hampered business and deterred owners in paying taxes, thereby substantially decreasing the payments made upon appellee's bonds.

Appellant states that the flooding of this land "did not prevent the operation of the state law permitting reassessments," and again it is argued that it was the purchase by the government, rather than the flooding of the property, which injured appellee. Throughout this argument, as well as throughout the entire brief, appellant's counsel apparently lose sight of the fact that appellee did not join in the execution of the deeds whereby the lands in this litigation were conveyed to the government. For this reason the conveyances did not in any way affect appellee's interest in such lands (44 C. J. 806).

It should also be borne in mind that these reassessments became effective July 3, 1928 (exhibit 16), at which time ordinances numbers 122 to 125, inclusive, were enacted. No objection was made to these reassessments, and for all questions involved in this litigation the same must be

considered as valid and effective. At the time these reassessments were enacted, and until some time in 1929 (134) the government had in its possession and under its control ample funds to pay the appellee the amounts owing it upon these bonds. Since the reassessments were valid and were enacted before this money was refunded to the landowners, there would seem to be no reason in law or fact why the government should not be bound thereby.

Reassessments of this nature are so generally upheld that an extensive citation of authorities would not seem to be necessary (12 C. J. 1265). In the case of Kadow v Paul, 274 U. S. 175, the U. S. Supreme Court had occasion to consider reassessments very similar to those involved in this case. In that case the Supreme Court stated that supplemental assessments are recognized as a legitimate part of the proceeding necessary to raise the money and pay bonds of this nature, "and if in the process of collection it shall appear that some of the assessed land fails to pay the assessment and is appropriated and sold, the distribution of the deficit thus arising to be included in another assessment is only meeting the to be expected cost of the improvement." Several cases are cited to support this conclusion. As pointed out in a quotation contained in the case of Kuehl v City of Edmunds, 157 Pac. 850, 853, reassesments are resorted to most frequently in cases where the original assessments are based upon er-

roneous estimates; however, they are legal and permissible in cases where "the cost of the improvement has been computed erroneously, and the assessment has been levied for too small an amount to meet the cost of the improvement." As stated in the rather recent case of Klemm v Davenport, 70 A. L. R. (Fla) 156, 161:

> "Aside from the question of double taxation, the principle is well established in this country that in addition to his proportion of a laid tax a taxpayer may be required to pay an additional amount to make up deficiencies caused by the neglect or inability of other taxpayers to pay their assessments, * * *(citing a number of cases on pp. 161-2)."

In addition to these decisions, announcing the general rule, reference is had to two applicable Idaho statutes, containing duplicate authority for reassessments under such circumstances, towit, C. S. secs. 4024 and 4141, the former providing in part that,

> "Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made, it shall be lawful * * * to make reassessments on all the property in said local district **sufficient to pay for such improvement** * * * ."

It is the evident intent and purpose of the statute that the improvement shall be fully paid for. This thought is thus expressed in the case of Norris v Montezuma Valley Irr. Dist., 248 Fed 369, 373:

> "In order to give full force and effect to every

> portion of the statute there must not only be an assessment and levy, but the debt must be paid. The statutory obligation of a municipal corporation or quasi municipal corporation to pay its debt, or to fix a rate of levy necessary to provide the amount of money required to pay its debt is not satisfied by an assessment and rate of levy sufficient to pay the debt if the taxes are collected, **but requires that there be a sufficient assessment and levy and collection of the taxes as levied to actually pay the debt.**"

The same thought is likewise reiterated by the Supreme Court of California in the recent case of Cowart v Union Paving Co., 14 Pac. (2d) 764, 767:

> "The purpose of the reassessment act is that land benefited by an authorized public work shall not escape the payment of its proportionate share of the expense thereof. The essentials of jurisdiction to order a reassessment are that a public improvement has been made, that an assessment has been imposed or attempted, and that payment thereof has not been had."

Section 4007 of the Idaho statutes provides:

> "Whenever any expense or cost of work shall have been assessed on any land the **amount of said expenses shall become a lien upon said lands**, which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure."

Thus it is clear that the "amount of said expenses", rather than the amount of the assessment, determines the [illegible] and extent of the lien, and if the assessments are not made large enough to pay the full expense of the

work, the lien remains effective until such expense or cost of the work shall have been paid. Therefore, when the government took this property, the full amount of the cost and expense of the work not having been paid, it took it subject to the lien of the unpaid amount thereof. The reassessments did not make nor alter the liens already in force, but merely served to definitely fix the unpaid balance owing the bondholders. As the trial court stated on p. 4 of its opinion on the merits:

> "The law of the state provides that whenever the original assessment is insufficient to pay the costs for the improvement the city must reassess the property for an amount sufficient to pay them, (I. C. S. Sec. 4024). The purchasers of these bonds had a right to assume that should it turn out for **any reason** that the original assessment would be insufficient to pay the bonds in full that the city had authority to reassess the property upon which a lien is given to make up any deficiency. **The statute became one of the obligations of the bond.**"

In connection with the foregoing it seems proper to refer to the cases cited on page 32 of appellant's brief. These cases hold in substance that property of the United States is immune from taxation at the hands of the state or local municipalities. Predicating its stand upon this generally recognized rule, appellant argues that when the government purchased these lots the power of reassessment was cut off. The answer to this contention is to be found in the effect and priority of the lien of the reassessments. Such reassessments and the lien created there-

by are not new but a mere continuation of the original assessments and the liens thereof. The lien of the reassessment is part and parcel of the lien of, and relates back to, the lien of the original assessments. Both the original and reassessments are one and the same in contemplation of law. Any person acquiring land within an improvement district does so with the full knowledge of the fact of the assessments of the improvement district and the consequent power to make reassessments to pay any outstanding bonds of such district.

As was said in the case of Columbia Heights Realty Co. v Rudolph, 217 U. S. 547, 554:

> "Such a reassessment was but a continuance of the original proceeding, it might well be done by an amended but supplementary petition by virtue of the authority of the new act."

To the same effect see Reiff v City of Portland, 141 Pac. 167, where it is said:

> "The reassessment was, in a sense, a continuation of the original assessment proceedings."

To the same effect see the case of Duniway v City of Portland, 81 Pac. 945, 950; and 25 R. C. L. 170, note 8. It is pointed out in the case of Beezely v Astoria, 269 Pac. 216, that reassessments are supplementary to the original assessments, and that in case of the failure of the original assessments for any reason, reassessments may be resorted to, since the intent of the law is that the lien shall continue until the debt is extinguished.

The lien of the reassessment relates back to the original assessment, Commissioners of Sinking Fund v Linden, 40 N. J. Equity 27. The syllabus in the latter case is as follows:

> "In 1873 the township of Linden opened and graded an avenue, and caused an assessment for its share of the costs thereof to be laid on the land in controversy. In 1874 the owners of that land gave a mortgage thereon to complainants. In 1879, defendants being advised that the assessment was invalid, caused a re-assessment of the premises to be made, under a statute passed in 1878, which provided for re-assessments, and that from and after the filing of the map and report of the commissioners, the assessments should be and remain a lien on the property assessed, notwithstanding any devise, descent or alienation thereof, or any judgment, mortgage or encumbrance thereon. The complainants became the owners of the premises in 1880, under foreclosure of their mortgage, to which suit defendants were not made parties. On a bill to compel defendants to redeem—Held, that the statute of 1878 is constitutional, and that the lien of the re-assessment related back to the time of the original assessment, and was, consequently, prior to that of complainant's mortgage."

See also Hibben v Smith, 62 N. E. 447; McCartney v People, 66 N. E. 873; and Shaw v Snohomish, 28 LRANS 735, and note.

Under the foregoing authorities the appellee's claim against the property so taken by the government was a lien or encumbrance upon such property, which originated in 1915 and 1916 and continued unabated until destroyed by the government. The fundamental purpose of

such lien was to insure the full and complete payment of the obligation, and since the original levy was not sufficient to do this, the new levy and reassessment must be given the same force and effect as the original. Therefore, when the government confiscated this property early in 1927, it did so with both actual and constructive knowledge of the existence of appellee's claim upon the property. It had actual knowledge through its officials in charge, who went so far as to hold back money to pay these bonds for several years; and it had constructive knowledge because the existence of the districts and bonds was a matter of record, and the possibility of reassessments was likewise known to appellant because the same is provided by the statutes of Idaho. For these reasons the situation is entirely different from the situations involved in the cases cited on pages 32-34 of appellant's brief. In those cases and with the average ad valorem tax levy a new lien is created each year for the taxes for such year, but in the case of the improvement district like those now under consideration the lien is created when the work is done and it is not removed until the work is fully paid for.

IMPLIED CONTRACT-TAKING

It has been the constant holding of all state and federal courts for a number of years that there is an implied promise to make compensation where private prop-

erty not owned by the government is taken pursuant to an act of Congress and applied to public use. Perhaps the key case upon this question is that of United States v Great Falls Mfg. Co., 112 U. S. 645. This doctrine has been adopted by the Supreme Court of Idaho in the case of Boise Valley Construction Co. v Kroeger, 105 Pac. 1070. It has been reiterated and followed innumerable times by many state and federal courts. Among the more recent cases in the U. S. Supreme Court are those of United States v Cress, 243 U. S. 316, and Phelps v United States, infra page 66. A case wherein the facts are more similar to those in the immediate cause is that of Snowden v Fort Lyon Canal Co., 238 Fed. 495. In the latter case an irrigation company, authorized to condemn land for its works, constructed a reservoir on the land of the plaintiff without condemnation proceedings. It was held that by taking this property for such purpose the canal company impliedly agreed to compensate the owner therefor. Several leading decisions of the U. S. Supreme Court are cited and quoted from, among them being the Great Falls Mfg. case above referred to. See also, International Paper Co. v United States, 282 U. S. 399.

The case of United States v Lynah, 188 U. S. 445, is also a leading case upon this question. In the latter case certain dams and obstructions were placed in the Savannah River, with the result that the raised water backed up against plaintiff's river embankment and interfered with

the drainage of his plantation. The court held this to be a taking of private property, requiring compensation under the fifth amendment notwithstanding that the work was done by the government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property so overflowed. In the immediate case, as in the Lynah case, the government has constructed public works, raising the natural level of a water course beyond its banks, and has thereby overflowed and appropriated the private property of the plaintiff—appellee. It is difficult to imagine a case coming more directly within the principle so often enforced by the Supreme Court of the United States than the present case. As pointed out on page 470 of the Supreme Court's opinion in the Lynah case, when the government constructs such a dam and floods the property of an individual to such an extent as to substantially destroy the value of the land, there is a taking within the scope of the fifth amendment. While the government may not have appropriated appellee's title, yet it has taken away the use and value thereof, so that what is left is of little consequence, and it might as well be concluded that the government has taken the absolute fee of appellee's property. It would be useless to extend the citation of cases upon this point, because the principle has become firmly imbedded in the laws of the

United States, and is universally recognized by all courts.

However, there is one other case, which is of particular interest, because of the similarity of the "property right" taken by the government. In the case of Tucker v United States, 283 Fed. 428, complainant had a right of way or easement over certain lands, which lands were wholly taken by the government for naval training purposes without compensation to complainant. After citing and quoting from several leading cases, the court said:

> "In the present case it appears that, before perfecting a title by purchase, but with the consent of the owners of the fee, and **in expectation of thereafter perfecting title**, the United States took possession of the Coddington Point land. The continued holding of possession of the land, and the erection of buildings, fences, and other constructions thereon, under governmental authority and for governmental use, resulted in such an appropriation as would, in any event, give a right of action against the government (in favor of the owners of the easement). U. S. v. North American Co., 253 U. S. 330, 334, 40 Sup. Ct. 518, 64 L. Ed. 935."

Under the case cited above, tending to show that appellee's bonds constitute a property right, to-wit: an encumbrance upon the property in the districts, and that this lien or encumbrance has been destroyed by the flooding of the land in the district, no one can intelligently state that appellee's property has not been taken by the government for this public purpose, and since the appellee admittedly has not been paid, it must also be admitted

that the government took the property without compensating appellee therefor. It is difficult to conceive how one could take the position that the property has not been taken in a constitutional sense, because the appellee's only property is a lien or encumbrance upon the land, or an interest in the land, and the land has been completely and absolutely confiscated and appropriated by the government for reservoir purposes for all times.

On page 24 of its brief and at other points following the appellant takes the position that when the government officials were taking possession of this reservoir site they claimed ownership and exclusive title to all the property and did not recognize any right, title, or interest in appellee. With due respect to appellant's counsel we do not believe that the record substantiates this position. On page 25 of its brief appellant quotes from the testimony of Mr. Banks, the government engineer in charge of the construction work, wherein he states that he claimed title to the full property in the government and did not recognize appellee's interest. If this were the only showing in the record upon this point, there might be some support for appellant's position. The court's attention is directed to the testimony of this same witness on page 134 of the record, where he states that the government withheld $13,000 to $14,000 "for the purpose of paying any reassessments that might be held valid liens." On

page 136 the testimony of Mr. Bohlson, another government employe, is to the effect that money was deducted from the purchases "to protect the United States against the possibility of other assessments in the various improvement districts." On the same page he further states that they held out enough to retire any assessments that might be levied in the future on account of existing bonds, and the following words are also taken from his testimony:

> "All of the representatives of the government that had anything to do with the acquiring of title knew that these bonds were outstanding along sometime after the reports to that effect got out that the bonds were not all being retired."

On page 137 he states that the money was withheld pending a decision as to the validity of the lien. These are the only two witnesses submitted by the Appellant. Appellee's witness Davie stated that money was held out of the purchase price of his property for the same purpose (121); witness Sparks, mayor of American Falls, testified to the same effect (122), and the latter witness further testified that "it was commonly known around town that a portion of the money due each property holder in the district was withheld by the government for that purpose." Witness Sparks also testified that "Some deductions were made in purchases about the year 1923 * * * The amount of these temporary suspensions were returned without comment to the land owners; * * *" (124). Upon the

strength of this testimony, the trial court found, as pointed out on the bottom of page 25 of appellant's brief, that the government officials recognized the rights of appellee at the time of the taking of this property for this public purpose. In view of this showing and finding we cannot understand how appellant's counsel can take the position that the government officials took possession of appellee's property without recognizing appellee's claim.

Bearing in mind the above mentioned evidence and finding, to the effect that the government officials recognized plaintiff's claim at the time its property was taken, the following quotation from the case of Tempel v United States, 248 U. S. 121, 131, seems particularly pertinent:

> "Under such circumstances it must be assumed that the government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise. **And when the implied promise to pay has once arisen, a later denial by the government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort.**"

The Tempel case is quoted from extensively on page 26 of appellant's brief. It is true that the claim for compensation in the Tempel case was denied. In that case the government was merely dredging a deeper channel in a river bed already flooded and in use for navigation purposes. The facts are entirely different from the present

case where citizens were ousted from their homes and business houses to permit the building of a reservoir. Appellee had a lien upon such lands, homes, and business houses, that lien has been destroyed but the government has not compensated the appellee for his lien.

The above quotation from the Tempel case is quoted and approved in the case of Tucker v United States, 283 Fed. 428 (supra page 44), which is very analogous to the immediate case. In the Tucker case the court adds these pertinent words:

> "The United States does not claim that it had title to that property which the petitioners claim to own, nor a right to take such property rights without compensation, if such rights existed. Its denial of plaintiff's title is not an assertion of its own title to the property, which plaintiffs say has been destroyed."

The only title or property rights the government claimed, or could lawfully claim, when its officials took possession of the American Falls reservoir site and ousted appellee, were the rights which the government acquired through the conveyances from the various individuals, or through the condemnation proceedings. In the condemnation proceedings the government only acquired the rights of those who were made parties to such actions (Ill. Trust & Sav. Bank v City of Des Moines, 224 Fed. 620), and of course neither appellee nor its predecessor in interest was party to such proceedings (71). In the

cases where the lands were acquired by the government by private conveyances from the owners of the fee, without the owner of the bonds and liens joining such conveyances, the liens were not affected (44 C. J. 806, notes 44-5-6).

An extensive discussion of all the cases cited by appellant upon this general proposition is hardly in place, but a few will be referred to. On page 23 it cites the case of Hill v United States. In that case the plaintiff sued the United States for the use and occupation of land for a lighthouse. This land so occupied by the lighthouse was submerged land in Chesapeake Bay. Patently the situation is entirely different here. On the same page the case of B. & O. Railway Co., v United States is cited. That case was under the Dent act, and the court denied compensation. The court found that the government authorities did not order the work done, but rather the work for which compensation was claimed was voluntarily undertaken by the claimant, without anything having been said about pay, etc.

On the same page he cites and quotes from the case of Omnia Commercial Co. v United States. As the U. S. Supreme Court recently said of that case:

> "We perceive no difficulty arising from the case of Omnia Commercial Co. v United States * * * There the taking of the whole product of a company went no further than to make it practically impossible

for that company to keep a collateral contract to deliver a certain amount of steel to appellant.'' International Paper Co. v United States, 282 U. S. 399, 408.

EXTENT OF JUDGMENT

Beginning on page 36 of its brief appellant contends that the judgment rendered by the trial court gives more relief against the government than could have been granted had an individual been defendant. Its argument is predicated on three grounds.

The first one (a) is that the appellee's sole remedy is for the foreclosure of the liens of the assessments. In connection with this argument it is stated on page 38 of the brief that the United States has paid the owners of the property the full value of the property, and also has ''paid all taxes and liens of every nature which then existed against said property.'' It has already been shown that the government took this property with full knowledge of the claims on the part of appellee and until some time in 1929 held out sufficient funds to satisfy appellee's claim, but later changed its program and paid this money to the owners of the fee. It has also been shown that appellee held liens against the property taken by the government for reservoir purposes, which are not yet fully paid.

Appellant contends that the sole remedy of appellee, as such bondholder, was an action to foreclose its lien,

and on pages 42 and 43 cites authorities holding that one cannot have a personal judgment upon a debt secured by a lien until the security is exhausted. In brief, appellant seems of the opinion that we should have foreclosed our liens and taken a deficiency judgment. Under ordinary circumstances this, of course, is the case, but the law does not require one to do a vain and useless thing, and when the security has been absolutely confiscated and appropriated by some third party, as is true in the immediate cause, the law does not require the appellee to go through the empty formality of foreclosing a lien upon the shadow of his security. Where the security has been exhausted, "necessarily there is nothing to foreclose and as a general rule the action may be brought to enforce the claim as though it had never been secured." 18 Cal. Jur. 249. Such is the rule in Idaho,—Warner v Bookstahler, 282 Pac. 862. The government, through its duly authorized officials, has placed this security beyond the reach of the courts and has completely destroyed the security of appellee's claim for all legal considerations.

Without the consent of appellee the government has appropriated the property against which appellee held a valid and unpaid lien, and in law and equity the appellant is liable to appellee therefor. As stated in the case of Morgan v Willman, 58 A. L. R. 1518, 1532, the owner of property taken for a public use is guaranteed just com-

pensation for the property so taken; it is not sufficient that the confiscator pay the full value of the property taken to the owner of the fee without paying the mortgagee his claim; the mortgagee must be paid the amount that is due him, and if the appropriator does not see that the mortgagee is so paid, such appropriator may be held to pay a second time. In the latter case it is further pointed out that if such a rule results in hardship it is only due to the conduct of the officers in charge, and the mortgagee should not be made to suffer because thereof. On page 38 of its brief appellant suggests that such a result is "absurd". However, the Missouri case just quoted from is supported by the majority view, as shown in the annotation beginning on page 1534 of 58 A. L. R.

Appellant's second ground for asserting that the relief afforded by the judgment is excessive is that the recovery should be limited to the market value of the property and not to the amount due upon the bonds. This premise is stated on page 36 and argued in more detail on pages 43-4 of appellant's brief. It is contended that the maximum amount for which judgment could have been rendered would be the market value of the lots minus the total of the liens superior to the assessment liens in question. Again appellant misconceives the nature of the appellee's property. As already pointed out the bonds held by appellee merely evidence the obligation created by

the assessment (Balaam v Pacific States Sav. & Loan Co., supra). The property actually taken by appellant was appellee's interest in the land submerged by the reservoir—its lien against the property within the improvement districts in question. As pointed out on page 30 hereof the Supreme Court of Idaho has held that the lien of similar bonds is "paramount to any other lien except those of the general state, county and city taxes." Therefore, when the government confiscated the lands in question, it should have first paid the general city, county and state taxes and then paid appellee's bonds, before paying over any money to the owner of the fee. Since these bonds constituted a first lien against the property in the respective districts, except for city, county and state taxes, and since neither the property owner nor the municipality is personally liable thereon, the land lien constituting the only value of the bonds, the amount due upon the bond debt represents the market value of appellee's property so confiscated and appropriated, unless it be shown that the property so taken was actually worth less than the amount due upon general taxes and upon these bonds.

On page 43 of appellant's brief it is argued that the record contains no support of the trial court's findings that the value of the property taken exceeded the claim of appellee upon the bonds. While there is no direct testimony as to the value of each and every lot, yet as pointed

out on page 45 of this brief, the government officials when buying this property held out from the purchase prices $13,000.00 to $14,000.00 for the purpose of paying these reassessments. Patently if the property had not been worth more than $13,000.00 or $14,000.00 the government officials could not have withheld this much money, because the very act of withholding assumes that something was paid to the owners of the fee over and above the amount so withheld. The amount so withheld is greatly in excess of the amount of the judgments rendered in both the cases now before the court, as the total of the judgments is less than $10,000.00. This is ample evidence to support the trial court's findings that the property taken was greatly in excess of appellee's claim (72).

The general rule, both in Idaho and in the United States courts, is that the market value of property taken for public purposes is the measure of damages. This market value is estimated by reference to the uses for which the property is suitable and customarily used. This rule is announced by the Idaho court in the case of Idaho Farm Development Co. v Brackett, 213 Pac. 696. The latter case cites decisions from the U. S. Supreme Court and many other courts. The market value of appellee's property so taken was the amount due upon its obligation, and this is the amount in which the trial court gave judgment.

The third ground upon wihch the appellant claims the trial court's judgment is excessive is that the lots were not subject to reassessment under state law. The premise is stated on page 36 and argued more in detail on pages 44-47 of appellant's brief. The validity and general effect of these reassessments is argued in detail beginning on page .... of this brief. This argument will not be repeated here. The court is respectfully requested to refer to such portion of the brief in connection with this argument.

On page 46 of appellant's brief the statement is made that no attempt has been made to show that the original assessment was not sufficient to pay the actual cost of the work. In making this statement appellant's counsel apparently overlooked the contents of plaintiff's exhibit No. 16. This exhibit contains ordinances Nos. 122 to 124 of the City of American Falls, which are the reassessment ordinances enacted July 3, 1928. For the convenience of the court we quote the following, which in substance is contained in section 1 of each of these ordinances, to-wit:

> "Section 1. That from some cause, mistake or inadvertence the assessments heretofore levied under the provisions of Ordinance No. 55, of the Village (now City) of American Falls, as amended, for the purpose of paying the costs of the improvements authorized by said ordinance, as amended, and for the purpose of paying certain bonds issued under authority of said ordinance to

> pay the improvements authorized by said ordinance, as amended, are outstanding and unpaid, together with interest thereon; the **original assessment** having been paid, but **being insufficient to pay the total of said bonds and interest issued for the construction of the improvements authorized by said ordinance and amendments, and there remains due, owing and unpaid on account of said improvements the sum of $4,440.78;** * *."

When the above provisions of the ordinances are compared with the reassessment statutes, which permit reassessments "whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district", it is readily apparent that sufficient showing has been made to comply with the statute, and support the trial courts finding. The City of American Falls made the determination that the original levies were insufficient, and thereupon made reassessments. This determination was not for the court to make. On the contrary the court accepts the determination made by the city. The determination so made by the city, being in the form of ordinances, is final and not subject to collateral attack in this or any other proceeding. 43 C. J. 555, sec. 869.

Appellant relies as to this phase of the argument primarily upon the case of Lucas v City of Nampa, which is quoted from on page 47 of appellant's brief. The cita-

tion of this case is erroneous in appellant's brief. There is a case by the same name contained at the citation shown in appellant's brief, but the Lucas case containing the words quoted by appellant is reported in 238 Pac. 288. Appellee does not feel that the Lucas case has any particular bearing upon the questions before the court. In that case the city engineer estimated the cost of the improvement at $118,300.00, and this estimate was approved and the assessment levied. Later another ordinance was enacted, making the total assesment $160,000.00. Action was instituted to restrain the collection of the excess over $118,300.00. The court granted the injunction upon the sole ground that there was no authority in the statutes for including the excess amount. Such excessive amounts were made up of an engineer's fee of 5% of the cost of the project; a 10% commission contracted for selling the bonds; and also the bonds were contracted to be sold at less than their par value. All of these items were not only not authorized by the Idaho statutes but were in fact prohibited by the statutes and state decisions. The situation in that case is entirely different from that now before the court. The reasons for the insufficiency of the orginal levies in the immediate cases are as pointed out by witness Bowen noted on pages 10 et seq. hereof.

Statutes permitting reassessments vary in different

jurisdictions. Naturally unless the situation falls within the statute the reassessment is not permissable. For instance, in the case of School District No. 1 v City of Helena, 287 Pac. 164, cited on page 37 of appellant's brief, the court denied a reassessment because the grounds upon which the same was sought were not within the terms of the statute. Several of the other cases cited by appellant are along this general line. At the same point appellant cites two Idaho cases. We submit that the Idaho cases do not hold against reassessments in instances coming within the statute. Idaho has two statutes (C. S. sections 4024 and 4141) permitting reassessments. These statutes authorize reassessments whenever **"for any cause, mistake or inadvertence"**, the original levy is insufficient. In studying this question the writers have not found any statute more generous or broader in its terms and comprehension than these two statutes. Under the majority rule and in view of the determination of the city, as contained in sections 1 of the ordinances (plaintiff's exhibit 16) reassessments were certainly justified in the immediate situation. The case of Klemm v Davenport, cited and quoted from on page 36 hereof, considers this question of reassessments rather fully and cites many cases. With apparent approval the following words are quoted from a Missouri case:

> "All the lands benefited can be retaxed whenever it appears that previous assessments are in-

> sufficient. Even if the assessment in the first instance was sufficient, if collected, to pay the cash in full for said improvements, yet if, after the allowance of a reasonable time for the collection from delinquents, a deficiency exists, and the legal remedies have been exhausted for the collection of taxes, or if the assessments made have been abandoned, or remained uncollected by the authorities having the matter of the collection in charge, the writ should be granted ordering an additional assessment.''

Other cases along these lines are cited and quoted from on pp. 35 et seq. hereof.

In view of these considerations it is urged that the judgment of the trial court is not excessive for either of the three reasons set out on page 36 of appellant's brief.

BONDS REPRESENT COSTS OF IMPROVEMENTS

On pages 51-2 of appellant's brief it is argued that the amended complaint in this action does not state a cause of action because it is only alleged that the original assessments were insufficient to pay the "**principal and interest on the bonds,** while the statute authorizes reassessment only when the original assessment 'is insufficient to pay the **cost of the improvement.**' " Appellant argues that the principal and interest on the bonds and the costs of the improvements are two widely different matters.

In making this argument appellant apparently overlooks the provisions of I. C. S. 4014 and 4142. The former section authorizes the issuance of bonds to provide "for

the payment of the costs and expenses'' of the assessments levied upon the installment plan rather than upon a cash plan. Section 4142 contains similar provisions. The only difference being that section 4014 deals with local improvement districts, while section 4142 deals specifically with sewer construction districts. In either case the purpose of the bonds is to provide for the costs of the work being paid over a period of years rather than in one cash sum when the work is done. Some of the bonds in the immediate controversy have to do with improvement of sidewalks and others with the construction of sewers. In either case the bonds were issued exclusively for the payment of the costs and expenses of the respective improvements. Therefore, when the amended complaint alleges that the original assessments were insufficient to pay the principal and interest on the bonds, it effectively and for all legal considerations alleges that the original assessments were insufficient to pay the costs and expenses of the various improvements.

In this conection appellant again refers to the case of Lucas v City of Nampa. As already pointed out the items which were disapproved of in the Lucas case were those not coming within the meaning of the applicable statutes. No such improper items are claimed in the immediate actions and that case has no particular bearing upon the situation. The original levies and the subsequent bond issues and reassessments were all for proper

and lawful charges, as was alleged in the complaint and found by the trial court.

APPELLEE'S OWNERSHIP

On pages 53-4 and on pages 57-8, appellant argues that the amended complaint fails to state a cause of action because the date of appellee's ownership is not specifically alleged or proved. Appellant's reasoning is that, since a claim against the United States cannot be assigned, the complaint should have set out the date of appellee's ownership of these bonds, so that it would definitely appear that appellee owned the bonds before the right of action accrued against the government.

The fact is that these bonds were actually transferred to appellee in 1925, which was nearly two years before the right of action against the government accrued. This statement is predicated upon the following data:

The bonds were issued in 1915 and 1916, and purchased by J. K. Mullen, at the suggestion of the local manager of the Mullen interests, witness Greene, and the latter has been looking after collections on the bonds since their issuance (82); appellee was incorporated in 1925 (82), and has held these bonds "ever since the incorporation * * * as the assets of the corporation" (85-6); the bonds were delivered to witness Greene as the property of the two appellee corporations (92); and Mr. Mullen and witness Greene turned them over to appellee's counsel in

this action for collection (93). In view of this evidence the court found that the appellee corporation was founded in 1925 (59); that Mr. Mullen purchased the bonds and transferred them to the appellee corporation, and such corporation is now the owner and holder of said bonds (62-3); similar findings are made as to the bonds of the various districts (65 and 68). It should be remembered that these bonds are payable to bearer (17), and under the provisions of I. C. S. 5897 the same may be negotiated and transferred by delivery.

Upon this proposition the trial court makes the following terse statement on page 4 of its memorandum opinion:

> "As to the ownership of the bonds they are made payable to 'bearer' and the evidence shows that plaintiffs have possession of them and also became the owners thereof."

In view of this evidence and these findings it can be stated that these bonds have been the exclusive property of the appellee since 1925. The statute cited on page 53 of appellant's brief, which now appears as 31 USCA, sec. 203, as pointed out by the Supreme Court of the United States in the case of Seaboard Air Line Ry. v United States, 256 U. S. 655, was intended to prevent frauds upon the treasury in two main particulars: first, the government might be embarrassed by having to deal with two persons instead of one if a claim against the government could be transferred; second, such transfers might open

the way for improper influences. See also, Monarch Mills v Jones, 56 Fed. (2d) 180, 183, and Kingan & Co. v United States, 44 Fed. (2d) 447, 450. The present situation is very analogous to that involved in the cases cited in that the bonds were bought by Mr. Mullen and transferred by him to a corporation which he organized and dominated. Even though the bonds had been transferred after the right of action accrued, which is not the case, the statute relied upon by appellant would not be a bar to the maintenance of the present actions, because there is no taint of fraud and there is no possibility of any embarrassment or injury to the government because of the transfer.

It is not necessary in a pleading to set out matters of evidence nor to anticipate and negative all possible defenses which the defendant may raise. Ordinarily it is sufficient to set out the essential facts. The statute which the government cites on page 53 of its brief would constitute a defense if the facts justified it. The actual facts do not justify such a defense, and it was not incumbent upon appellee to anticipate this defense and negative the same in its pleading. This rule is recognized universally. Some of the cases are cited in Bancroft's Code Pleading, sec. 168, where the author points out that it is not necessary in a complaint to anticipate or negative a defense, and that allegations inserted for the purpose of anticipating and cutting of a defense are superfluous and im-

material, etc. For these reasons it is insisted that it was not necessary that the amended complaint allege the exact date when appellee became the owner of these bonds. In fact, it became the owner thereof before the right of action accrued, and that is sufficient.

ALLEGE LANDS NOT ACQUIRED BY U. S. AT TAX SALE

On page 54-6 of its brief appellant argues that the amended complaint does not state a cause of action because there is no allegation that the lands for the reservoir site were not acquired by the United States at tax sales for delinquent state and county taxes. The same answer may be made to this premise that was made to the preceding one, namely, that such an allegation would be anticipating a defense, would be surplusage, and also would make the pleading unduly prolix.

On page 55 appellant cites an Idaho case which holds that a lien of general taxes is prior to that of special assessments. This is immaterial in the present controversy for the reason that the government held out more than enough money to pay for the bonds held by appellee, "in addition to the amount held back for the payment of current taxes" (122), and in addition to this "hold-out" substantial sums were paid to the owners of the fee of the property taken. As already stated, this situation and the entire record substantially prove that the lands so taken

and upon which appellee had liens were of sufficient value to pay all outstanding liens and encumbrances, and in addition paid money to the owners of the fee. The actual price paid for the specific lots is not shown, except in the case of one lot, which the government agreed to pay $[illegible] for (defendant's exhibit 1—page [illegible]), and except the lot of witness [illegible], from the sale of which enough was paid out to pay all special assessments, the reassessments, current taxes and a mortgage ([illegible]).

On page [illegible] of appellant['s brief] further argues that the complaint should have alleged that appellee owned all the unpaid bonds. By reference to exhibit [illegible] it appears that the total unpaid sums on the three districts in question totalled about nine thousand dollars when the reassessment ordinances were enacted. Upon the trial the balance was found to be $[illegible]. When these figures are compared with the bonds themselves and Mr. [illegible]'s computation (Ex. [illegible]) it reasonably appears that the bonds held by appellee represent all of the unpaid bonds issued in these districts. Appellee does not concede nor believe that it is necessary to allege that it owned all unpaid bonds. If appellee owned part of the unpaid bonds it would be entitled to compensation for their destruction upon the same theory that affords it compensation as the owner of all the unpaid bonds so destroyed.

INTEREST

On page 56 of its brief the appellant contends that the trial court erred in allowing interest from the date of the taking of the property to the date of the trial. It is urged that this item is only proper and lawful. Appellant cites only one case, which has to do with a libel action on account of a collision, and is entirely different from the action now before the court. To substantiate the claim for interest and also the entire case the following quotation and the authorities therein cited are submitted, from the case of Phelps v United States, 274 U. S. 341, 343, which involved an action for compensation for private property taken for public use pursuant to an act of Congress, like the immediate action:

> "Moreover, it has long been established that where, pursuant to an act of Congress, private property is taken for public use by officers or agents of the United States, the government is under an implied obligation to make just compensation. That implication being consistent with the constitutional duty of the government as well as with common justice, the owner's claim is one arising out of implied contract. United States v Great Falls Manufacturing Co., 112 U. S. 645, 656, 5 S. Ct. 306, 28 L. Ed. 846; Duckett v United States, 266 U. S. 149, 151, 45 S. Ct. 38, 69 L. Ed. 216, Campbell v United States, 266 U. S. 368, 370, 45 S. Ct. 115, 69 L. Ed. 328. The distinction between the cause of action considered in United States v North American Co. 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935, and a taking under the power of eminent domain was pointed out in Seaboard Air Line Ry. v Unit-

ed States, 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 664. Plaintiff's property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. Seaboard Air Line Ry. v United States, supra, 304 (43 S. Ct. 354); Brooks-Scanlon Corp. v United States, 265 U. S. 106, 123, 44 S. Ct. 471, 68 L. Ed. 934; Liggett & Myers Tobacco Co. v United States, 274 U. S. 215, 47 S. Ct. 581, 71 L. Ed. 1006."

"ON THE MERITS"

On page 57 of its brief appellant has a section of its brief entitled "On the Merits". An examination of this part of appellant's brief readily reveals that it is largely repetitious. The first few pages deal with the question of ownership of the bonds, which was discussed at an early point in appellant's brief and was discussed beginning on page 61 of this brief. Beginning on page 59, under the same heading, appellant again discusses the question of reassessments. This likewise has been discussed

by both parties at earlier points in the briefs.

On pages 65 et seq appellant discusses various items of the computation in the Bowen testimony, and particularly his set-up as contained in exhibit 14. On page 66 and at other points reference is made to the fact that some moneys of the district were lost in the First National Bank, which failed. By reference to paragraph 12 of the findings of fact in case No. 6868, page 57, it will be observed that the court makes due allowance for the amount of money so lost in the bank, together with interest thereon. In other words, appellee was not given any judgment for any money so lost in the bank, or the interest thereon. We fail to see how appellant has any complaint to make in this respect.

On pages 68-9 of appellant's brief considerable discussion and complaint is had relative to an item of $2916.53, which is referred to as the Forter judgment item. This matter is covered by finding of fact No. 14 on page 58 of the record in case 6868. The amount of this item, and the above bank item, with interest thereon, were deducted by the trial court in computing the amount due appellee. These items, and interest thereon, were treated by the trial court as though credited upon the bonds in due and regular course, therefore, appellant has no cause of complaint because thereof, and further discussion would seem entirely out of place.

The remaining pages of appellant's brief are either a summarization or repetition of matters already discussed.

It is respectfully urged that the government has taken appellee's property for a public use, and under long standing rules established by every court in the land there is an implied contract on the part of the government to repay the appellee the amount of its property so taken and confiscated for public purposes. The amount of the bonds, after making proper credits thereon for moneys lost in the failed bank, by reason of the failure of the officials to credit the Forter items, etc., represents the value of appellee's property so taken. The bonds are merely evidence of the property actually taken. The bonds themselves are of little value because neither the individual land owner nor the city can be held responsible thereon. By destroying the land upon which these bonds constituted a first lien, except the lien for general taxes, the government has effectively destroyed apppellee's entire property. When the government took this property, it had constructive notice of the apppellee's claim, given by the records showing the creation of the districts, in conjunction with the statutes of the state making the costs and expenses of the work, as represented by the bonds, a lien upon the land, and in conjunction with the reassessment statute, giving the officials the right to reassess when the original levies proved insufficient for any cause.

As Judge Cavanah stated, this "statute became one of the obligations of the bond." The government had actual notice of this claim on the part of appellee and for several years recognized such claim to the extent of holding out from $13,000.00 to $14,000.00 for the purpose of paying appellee, considerably more than the total of the two judgments under consideration. Despite all these considerations, and the many others revealed by the record, the government has confiscated and appropriated appellee's property completely, leaving appellee with merely the evidence of what formerly was a valuable property right. Under such circumstances it is only "consistent with the constitutional duty of the government as well as with common justice" to require the government to make just compensation for the property so appropriated for public purposes.

In view of the foregoing facts and authorities it is respectfully submitted that the judgment of the trial court should be affirmed.

BISSELL & BIRD,
Attorneys for Appellee